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SUPER PALLET RECYCLING CORP.

STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

ENVIRONMENTAL MANAGEMENT DEPARTMENT

In the Matter of the Notice and Order Pertaining to:

DIXON PIT LANDFILL;

Super Pallet Recycling, Corp. and Jasmail Singh/Five Star Auto and Towing,

Appellants.

OAH No. 2008 100665

APPELLANT SUPER PALLET RECYCLING CORPORATION'S RESPONSE TO LEA'S MOTION TO DISMISS APPEAL

Date: November 17, 2009
Time: 9:30 a.m.

I.

INTRODUCTION

The Local Enforcement Agency ("LEA") issued a Notice and Order dated September 30, 2008 (the "N&O") to the Owner/Operator (Five Star Auto and Towing, Inc. and Super Pallet Recycling Corporation, respectively) of the Dixon Pit Landfill pursuant to Public Resources Code Section ("PRC") 45000 and 14 California Code of Regulations ("CCR") Section 18304. The Order is a Compliance Order stating the

Owner/Operator is to take certain actions by specified dates or times. 14 CCR 18304.1 (a)(3). Five Star Auto and Towing, Inc. and Super Pallet requested a hearing and the matter was heard by Administrative Law Judge Catherine B. Frink who issued a written decision upholding the N&O on July 24, 2009. Pursuant to PRC 45030, Super Pallet Recycling Corporation (hereinafter Super Pallet or Appellant) appealed on its own behalf to the California Integrated Waste Management Board (hereinafter CIWMB) to review the written decision of the Administrative Law Judge in the above entitled matter.

Appellant submits the following response to the LEA's motion to dismiss the appeal. The LEA argues the ALJ erred by hearing the appeal, and the LEA by its brief asserts the CIWMB should reverse the LEA and dismiss the appeal. The LEA asserts error on the following grounds that: 1) the ALJ erred in hearing the appeal because the statement of issues was deficient; 2) the issues on this appeal were allegedly not raised in the ALJ hearing; and, 3) the issues raised are allegedly not "substantial." Appellant addresses each of these allegations below and respectfully requests that the CIWMB hear this appeal on its merits.

II.

ARGUMENT

A. THE LEA POSITION ON THIS APPEAL IS CONTRADICTORY.

The LEA is arguing that the Board should reject Appellant's appeal because the appeal should never have been heard in the first place despite the fact that the ALJ found in favor of the LEA and upheld the Notice and Order. In effect, this appeal of the ALJ decision is the LEA requesting that the Board overturn the decision of the ALJ upholding the N&O. It was the LEA itself that elected to schedule the hearing rather than reject the request for hearing as deficient; therefore the LEA cannot now complain that the hearing

was held as scheduled. As will be discussed in more detail below, the LEA waived any allegations of error by the ALJ since it did not file an appeal of the ALJ decision.

B. THE LEA SET A HEARING INSTEAD OF REJECTING THE APPEAL AS INSUFFICIENT; THEREFORE, THE LEA HAS WAIVED THE ISSUE OF THE SUFFICIENCY OF THE STATEMENT OF ISSUES AT THE FIRST APPEAL.

Pursuant to Public Resources Code ¶ 44310:

> All hearings conducted pursuant to this chapter shall be based on the following procedures:
> (a) (1) The hearing shall be initiated by the filing of a written request for a hearing with a statement of the issues.
> ...
> (2)The enforcement agency shall, within 15 days from the date of receipt of a request for a hearing, provide written notice to the person filing the request notifying the person of the date, time, and place of the hearing.
> (3) **If the person fails to request a hearing or to timely file a statement of the issues, the enforcement agency may take the proposed action without a hearing or may, at its discretion, proceed with a hearing before taking the proposed action.** (Emphasis added.)

The LEA does not dispute that Appellant timely filed a written request for a hearing; however, the LEA alleges that the statement of issues was deficient or non-existent and that the ALJ erred in hearing the appeal in the first place due to this alleged deficiency. As set forth in PRC ¶ 44310, quoted above, if there is no request for a hearing or if there is a failure to file a statement of the issues, the LEA "may take the proposed action **without a hearing or may, at its discretion, proceed with a hearing** before taking the proposed action." (Emphasis added.) Although the LEA considered the statement of issues to be deficient or non-existent, the LEA exercised its discretion and elected to proceed with a hearing before taking the proposed action. In its brief, the LEA admits that "**the LEA gave great thought to not accepting the statutorily deficient**

request for hearing and not setting a hearing. However, acting in the abundance of caution, the LEA did set the hearing and then raised the issue of facial sufficiency of the hearing request in its statutorily required written response to issues (see PRC 44301(a)(4)) (Ex. E, pp. 3-5)" (Emphasis added.) (LEA Brief p. 4:11-16) Once the LEA elected to exercise its discretion and go forward with a hearing despite its alleged misgivings about the statement of issues it was bound by that decision and cannot be heard to complain if the hearing went forward as scheduled.

C. THE LEA DID NOT FILE AN APPEAL OF THE ALJ DECISION AND HAS THEREFORE WAIVED ALL ASSERTIONS OF ERROR ON THE PART OF THE ALJ.

The ALJ found on behalf of the LEA and upheld the N&O. Super Pallet filed this appeal of the ALJ decision and is the Appellant in this matter; however, in its opposition to the appeal the LEA is alleging error on the part of the ALJ. Even though the ALJ upheld the N&O, the LEA is alleging in its opposition brief that the ALJ erred by hearing the appeal in the first place because of an alleged failure by Appellant to submit an adequate statement of issues. Since the LEA failed to file its own appeal of the ALJ decision, all of the LEA's assertions of error by the ALJ in the prior appeal have been waived by the failure to give notice of appeal. The LEA's attempt to appeal the decision by way of its opposition to Super Pallet's appeal is improper.

Public Resources Code ¶ 45030 states in pertinent part:

> (a) **A party to a hearing** held pursuant to Chapter 4 (commencing with Section 44300) of Part 4 **may appeal to the board to review the written decision of the hearing panel or hearing officer**...under the following circumstances:
>
> (1) **Within 10 days from the date of issuance of a written decision** by a hearing panel or hearing officer.
>
> ...
>
> (b) An appellant shall **commence an appeal** to the board **by filing a written request for a hearing together**

> **with a brief summary statement** of the legal and factual basis for the appeal.

Administrative Law Judge Catherine B. Frink issued a written decision upholding the N&O on July 24, 2009. The LEA did not file a written request for a hearing together with a brief summary statement of the basis for the appeal within 10 days of July 24, 2009 and, in fact, has never filed any request for a hearing on appeal with the CIWMB, as such, the LEA has waived any allegations of error on the part of the ALJ.

In its brief the LEA states: "The LEA argued vigorously regarding the sufficiency of the statement of issues prior to the hearing, twice in writing (Exhibit N & T) and again orally to the ALJ (RT 1/5/09 pp. 27-49) To the great disappointment of the LEA the ALJ overruled its objections and allowed the hearing to go forward (RT 1/5/09 pp. 37-49)." (LEA Brief p. 5:7-10) The LEA further argues that the ALJ's actions in allowing the hearing to go forward were contrary to the policies of Division 30 and that "the LEA strongly asserts that this Board should uphold and defend its law and require a meaningful written statement of issues to effectuate and implement the policies of this division." (LEA Brief p. 6:15-17) The LEA is basically arguing that the current appeal should not go forward because the previous appeal should not have gone forward. If the LEA's position had any merit, then on the same basis, the LEA should have filed a notice of appeal, and the failure to file an appeal of the decision of the ALJ constitutes a waiver of the issue. Therefore, this issue/argument cannot be raised in an opposition to an appeal filed by the other party.

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D. THE CIWMB SHOULD ACCEPT THIS APPEAL BECAUSE SUBSTANTIAL ISSUES HAVE BEEN RAISED

1. The Issues Raised In the Appeal Were Raised and Addressed During the ALJ Appeal.

The LEA argues that the Board should not hear the appeal because the issues raised on appeal to the Board were allegedly not raised at the ALJ hearing. During the ALJ appeal proceeding, the issues were generally outlined; however, through briefing and testimony the issues raised on this appeal were argued as part of the general issues identified by the parties and the ALJ. In the proceeding before the ALJ, the LEA also objected to these very same issues, among others; however, the ALJ only agreed with the LEA with regard to "Additional Actions to be Taken" relating to the GEM 2000, monitoring frequency and changes to the LGMP and ruled that "these matters were not previously raised as issues on appeal; they are beyond the scope of these proceedings, and are not further addressed herein." In her written Decision, the ALJ specifically addressed most of the issues objected to by the LEA herein and with regard to any others held that "[a]ll arguments of the parties not specifically addressed herein were considered and are rejected." (ALJ Decision p. 23, para.18) The LEA again attempts to argue that the ALJ erred by allowing the hearing to go forward on these issues but, as noted above, this issue/argument was waived due to the LEA's failure to file an appeal.

The LEA argues that the following issues are being raised for the first time on appeal to this Board; however, a review of the briefs and the Decision of the ALJ filed in the previous appeal proceeding reveal otherwise. Each issue identified by the LEA will be discussed below:

1. Mootness and the impact of finalizing the order. This issue was raised and discussed during the ALJ hearing process as is evidenced by a specific

finding by the ALJ on this issue in its Decision: "...However, the fact that appellants have taken some of the corrective actions specified in the Notice and Order does not make the issuance of the Notice and Order 'moot.'..." (ALJ Decision p. 21, para. 10) The LEA also argued the mootness issue in it's Reply Brief. (See LEA Reply Brief pp. 2:12-3:28)

2. The distinction between operational and operating. This was specifically identified as an issue by the LEA: "4. Both of the extraction wells are now completed (IGE-7 was completed on 12-1-08). The new extraction wells were not needed and we have recommended that they not be used at the present time (they are operational, but will not be operated). They were a waste of $20K." (LEA Post Hearing Brief p. 10:2-5)

   This issue was the subject of evidence and testimony by Appellant's expert as noted by the LEA in its Post Hearing Brief: "The evidence clearly shows the two wells are now installed, effective December 1, 2008 according to Mr. Bergman's e-mail. However, Mr. Bergman un-equivocally states that they will not be operated, both in his testimony and in his e-mail. Appellants demonstrate an intent to defy both the notice and order and the requirements of the landfill gas control plan (which included the two wells). The Notice and order directs appellants to 'implement the approved plans for the installation of the two new infill gas extraction wells to control gas at the permitted boundary and have both be operational.' The deadline for this was November 17, 2008" (LEA Post Hearing Brief p. 10:20-27)

3. References to probes other than 10-2. Appellants specifically identified

this issue on appeal to the ALJ: "The N&O states the methane gas concentration at probe 10-2 "must be continuously controlled so as not to exceed the regulatory limit of 5 percent by volume of air." Citing 27 CCR 20921. The basis of the N&O is described as gas concentrations at probe 10-2 in 2007 and 2008 which showed readings in excess of 5% of methane by volume of air. The perimeter subsurface gas monitoring network, which monitors the efficacy of gas control at the site perimeter, includes 10 sets of three perimeter probes each, of which one is at issue, probe 10-2. There is no reason for any finding or order regarding the balance of the system. " (Appellant's Supplemental Statement of Issues pg. 6) The LEA also acknowledged the issue when it stated: "The fact that a disposal site has 10 test wells and 30 probes, 29 of which read below 5% does not excuse an operator from keeping that one remaining probe from exceeding 5%. 27 CCR 20921(a)(2) requires methane gas around the entire perimeter to remain below 5% to protect the health and safety of the public. There is no exception for one probe." (LEA Post Hearing Brief p. 3:6-10)

4. Whether or not the timeline of immediately and continuously was reasonable and appropriate. This issue was specifically addressed by the ALJ in her Decision: See page 22, paragraph 13 of the ALJ Decision: "13. Appellants objected to the "compliance date" of "immediately and continuously" for the requirement at section 1 of the Notice and Order, Specific Actions Required (page 5), that "the methane gas concentration at probe 10-2 and all other perimeter probes must be continuously controlled

so as not to exceed the regulatory limit of 5%." The LEA also argued that: "The language of these regulations, specifically established to the protect public health and safety, is very clear. The gas migrating from the disposal site boundary cannot exceed 5%. There are no exceptions. There are no excuses." (LEA Post Hearing Brief p. 2:21-23) The LEA also argued: "Thus based, on the uncontroverted violations, the LEA was clearly acting within its authority in establishing compliance and establishing a time schedule for that compliance." (LEA Post Hearing Brief p. 4:22-24)

5. Whether the terms "immediately and continuously" are contradictory, impossible and onerous. See #4, above.

6. Whether the term "any other corrective measures" is unreasonable, vague or overly broad. This issue was specifically raised by Appellant in its closing brief: "The term "additional corrective measures" in the N&O is too vague to give notice of what is required of the Owner/Operator. According to the N&O, these unknown "additional corrective measures" must be completed by November 17, 2008. This provision is unconstitutionally vague and is unenforceable because it violates the due process clause." (Appellant's Closing Brief pg.12, sec.2)

7. Whether the requirement to implement any other corrective measures was reasonable and appropriate. See #6, above.

8. The elements set forth in Public Resources Code Section 45016. Public Resources Code Section 45016 states that "In making a determination regarding the allegations in, and the amount of any liability that may be

imposed pursuant to, and order, petition, or complain and determining the appropriate outcome, and when determining whether to deny, suspend, or revoke a permit or to deny a permit application, the issuing agency, the board, or a court, as the case may be, **shall** take into consideration: ..." (Emphasis added.)

9. The impact of finalizing the September 30, 2008 Notice and Order. See #1, above.

2. The Issues Raised Are Substantial and Should Be Heard by the Board.

The issues raised on this appeal are substantial because the efficacy of the requirements in the Notice and Order are in question. While the LEA is authorized to issue a Notice and Order if there is a violation of emission limits, there is an element of reasonableness that must be implied. It is not just simply that a violation occurred and that a Notice and Order was issued requiring corrective action. That is merely the "small picture." The "big picture" is 1) the validity of an order whose "time schedule" for compliance is "immediately;"[1] 2) the validity of an order that requires the expenditure of money for wells that are detrimental to the entire gas control system and which cause the entire system to fail[2]; 3) the validity of an order that requires the installation of two wells that have already been installed; 4) the validity of an order that requires the installation of two wells whose operation would require supplementing the flare with purchased

[1] The LEA argues in its Brief: "The language immediately and continuously was applied to two requirements. The first was to control the methane gas concentration so as not to exceed 5% (ex. F, p.5). **There is nothing contrary to section 45011 in ordering immediate and continuous compliance** with this requirement. **There is no reasonableness requirement in section 45011**. What section 45011 does say is that **the LEA may issue an order establishing a time schedule** according to which the facility or site shall be brought into compliance." (Emphasis added.) (LEA Brief 24:18-25)

[2] The LEA argues that it was the landfill's own engineer who proposed the installation of the two new wells. Appellant does not deny this; however, evidence was presented that before the wells were installed, the engineer did modeling that demonstrated that the wells would be detrimental to the gas control system. Despite this data and confirmation of this conclusion by attempts to operate the wells, the LEA continues to insist that the wells be operated even though operation causes the system to shut down.

propane in order to keep it burning; and 5) the impact of an order that was issued 13 months ago and whose time deadlines for compliance expired 12 ½ months ago (or instantaneously with regard to the "immediate" time schedule). These are not insubstantial issues.

It should also be noted that a recent development has occurred which prevents Appellant from having access to the property. Due to litigation between Appellant and the owner of the landfill, Appellant does not have access to the property and cannot perform any of the required testing or take any actions with regard to the gas emissions. In an effort to comply with the gas emission requirements, Appellant requested that a receiver be appointed to take over the property; however, the court only appointed a receiver for the limited purpose of determining whether the owner is complying with environmental laws. As the LEA is aware, the owner of the property has refused to participate in any of the appeal proceedings. Obviously, from Appellant's point of view, having time deadlines which are "immediate" and operational requirements that cause the gas control system to fail when Appellants do not have physical access to the property are of great concern.

III.

CONCLUSION

The LEA scheduled a hearing rather than rejecting the request for hearing as insufficient; therefore, the LEA cannot now complain that the hearing went forward as scheduled. The LEA failed to file an appeal of the ALJ's Decision; therefore, the LEA waived any and all issues/arguments that the ALJ erred. The statement of issues was deemed adequate by the ALJ and the LEA did not appeal; therefore the LEA's argument that the hearing should not have gone forward due to a deficient statement of issues was

waived. The issues raised in this appeal were part of the previous appeal and the issues raised are substantial. Appellant respectfully requests that the CIWMB reject the LEA's motion to dismiss the appeal and proceed to hear this appeal on its merits.

Dated: November 2, 2009

Respectfully submitted,

By: _____

PATRICK T. MARKHAM, ESQ.
Attorneys for Appellant
SUPER PALLET RECYCLING CORP.

Case: *Dixon Pit Landfill*
Court: BEFORE THE COUNTY OF SACRAMENTO, ENVIRONMENTAL MANAGEMENT DEPARTMENT STATE OF CALIFORNIA, OAH No. 2008 100665

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 8950 Cal Center Drive, Suite 210, Sacramento, California 95826-3228. On **November 2, 2009** I served the foregoing document(s) described as:

by placing the original or a true copy thereof enclosed in sealed envelopes addressed as follows:

- APPELLANT SUPER PALLET RECYCLING CORPORATION'S RESPONSE TO LEA'S MOTION TO DISMISS APPEAL

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☒ **BY ELECTRONIC SERVICE**
based on court order or an agreement of the parties to accept service via email I caused the document(s) listed above to be electronically transmitted to the person(s) set forth above.

☐ **BY FACSIMILE**
by transmitting via facsimile the above listed document(s) to the fax number(s) set forth above on this date before 5:00 p.m.

☐ **BY PERSONAL SERVICE**
by causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth above.

Executed on **November 2, 2009** at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

M. Cunningham
MELISSA R. CUNNINGHAM